

FILED
BY JOY R. McCROSKE
2012 SEP -7 PM 3:16

IN THE CRIMINAL COURT FOR KNOX COUNTY, TENNESSEE
DIVISION I

STATE OF TENNESSEE

v.

LETALVIS DARNELL COBBINS,
LEMARICUS DEVAL DAVIDSON*, and
GEORGE GEOVONNI THOMAS,
Defendants.

) KNOX COUNTY CRIMINAL COURT,
) KNOXVILLE, TN *SRK*
) NO. 86216A, -B, and -C
)
) (* capital case)
)
)

ORDER

This cause came to be heard on the 20th day of August 2012, before Jon Kerry Blackwood, Senior Judge sitting by designation, upon the Motion to Recuse filed by the State of Tennessee, exhibits, arguments of counsel, and the entire record.

The primary argument advanced for this Court's recusal is the State's argument that the Court has lost its objectivity to act as the thirteenth juror based upon the Court's visceral reaction to the allegations contained in a TBI Report involving the misdeeds of the former presiding judge in this case, Richard Baumgartner. A brief synopsis of the timetable of this Court's involvement in this case may prove beneficial.

In February 2011 Richard Baumgartner announced that he would be taking a leave of absence for medical reasons. By that date, all of these cases had been tried and motions for a new trial were pending in all cases. This Court was designated to preside in Division I, Knox County Criminal Court in place of Richard Baumgartner. At the time Baumgartner announced his leave of absence, he was under investigation by the Tennessee Bureau of Investigation for the illegal use of drugs during a period of time that encompassed these trials. In March 2011, this Court was notified that

the State District Attorney General Pro Tempore and Baumgartner had reached a plea agreement which was entered that month. Based upon the information provided at the plea submission, this Court granted Baumgartner judicial diversion. This Court was thereafter designated as successor judge to preside over the pending motions for a new trial. The first motion for a new trial, State v. Cobbins, was set for June, three months after Baumgartner's plea. In preparation for the hearing, the Court reviewed the transcript of the Cobbins trial and the available record. Since weight and sufficiency of the evidence were raised, the Court was required to determine if, as successor judge, this Court could accept the verdict as thirteenth juror. At the hearing, the Court concluded that it could act as thirteenth juror and overruled the motion. However, on the day of the hearing, Cobbins was allowed to amend his motion to include allegations addressing Baumgartner's mental capacity to serve as presiding judge due to his extensive drug use. Cognizant that the other defendants would probably raise that same issue, the Court ordered the State to provide *in camera* the entire TBI investigative file for this Court to determine if the report contained any information that might be exculpatory on the issue of Baumgartner's competency.

After reading this report, the Court learned for the first time the extensive nature of Baumgartner's criminal activity. Not only was Baumgartner using drugs and being supplied drugs by an individual on probation from his court, the Court learned that Baumgartner was in a sexual relationship with a former drug court client. The Court learned that Baumgartner was taking 10-30 pills a day; lied about a drug test; approached judges to extract leniency for his paramour; engaged in delivering drugs to his paramour while she was in the hospital and carried his paramour to Chattanooga while jury selection in one of these cases was being conducted. This Court was shocked, sickened and disgusted by these revelations, and has on numerous occasions voiced these

sentiments. As a consequence of an examination of the file and having determined that an issue of structural error was a possible ground for a new trial, the Court made the file available for defense counsel. These motions for a new trial were set for December 1, 2011.

After reading this report, there were several other considerations that caused the Court to ponder the future direction of this case.

First, the report contained several statements by Assistant District Attorneys and the District Attorney concerning events they witnessed concerning Baumgartner and including conversations these witnesses had with Baumgartner. The Court was concerned that these individuals would be necessary witnesses at any hearing on structural error. Consequently, the Court was faced with the distinct possibility that the entire District Attorney's Office might be disqualified from all further proceeding.

Second, the Court was concerned that some events that were observed by the Assistant District Attorneys took place during the trial of these cases. Also, some conversations with Baumgartner about his erratic behavior took place in an *ex parte* fashion and were never reported to defense counsel. The Court anticipated that this issue might become an issue in a motion for a new trial.

Lastly, despite the exculpatory nature of this file, its contents were not disclosed to this Court or defense counsel for three months after Baumgartner's plea and only upon this Court's order.¹ Consequently, until the Court came to grips with these issues, the Court instructed counsel that we would communicate by email. This directive was to prevent these issues from being "leaked" to the

¹As stated above, the Court ruled upon Cobbins' motion for new trial (except for the Baumgartner-related issues) before this Court was aware of the contents of the TBI file.

press and protect innocent parties until this Court determined the best course of action to be followed in the event the District Attorney's Office was disqualified or these other issues became germane.

Consequently, the Court began reading the transcripts of the remaining three trials in preparation for a December hearing on structural error in all cases, as well as a thirteenth juror resolution. As the Court read the three remaining trial transcripts, it became apparent to the Court that the concept of criminal responsibility or facilitation to commit a felony was the predominant issue not only in the three remaining cases, but in State v. Cobbins. As the Court reviewed these transcripts, the Court became convinced that pursuant to Rule 25, Tennessee Rules of Criminal Procedure, the Court could not fulfill the duties as successor judge. This conclusion led the Court to review its findings in Cobbins. Viewing the Cobbins transcript in light of the concept of criminal responsibility, the Court concluded the original ruling that the Court could act as successor judge pursuant to Rule 25 T. R.Crim. P. was in error. This Court also realized that when the Court originally undertook this process, affirming the jury verdict was predominant in its thought process. Consequently, the Court concluded that this Court could not act as thirteenth juror.

In December, the Court held an exhaustive hearing wherein all of Baumgartner's misdeeds were revealed. The Court found that structural error existed in the previous trials and that the Court could not act as thirteenth juror. New trials were granted. Unfortunately, this Court made a statement that indicated that as part of its thirteenth juror analysis, the Court considered Baumgartner's credibility. That was a clear error and the Court did not intend to imply that the Court must evaluate the trial court's credibility as part of the thirteenth juror analysis. This Court meant that Baumgartner's credibility regarding his ability to make trial court rulings was an issue. This issue was especially pertinent since in many instances, Baumgartner would state he was confused

or that he would defer to his lawyer.² Nevertheless, the Court (as trial courts are wont to do) made an inappropriate comment on a matter of law.

After this ruling, the State made application for interlocutory appeal. These rulings were eventually reviewed by the Tennessee Supreme Court. A copy of the Supreme Court order is attached as an exhibit to this order. The case was remanded to the trial court to determine if this Court could perform its duties pursuant to Rule 25(b), Tennessee Rules Criminal Procedure. If not, the Court was obligated to grant a new trial. The opinion did not remand the case for any further hearing and this Court was ordered to act expeditiously. Two to three days after the opinion, this Court sent an email to all counsel informing them that the Court could not perform its Rule 25 duties and would be granting a new trial. The email also stated that the order would be entered later. The Court sent the email to allow the State to inform the victims' family of the ruling before the media announced it. The Court also requested a chamber's meeting of all counsel. At this stage, defendant Thomas had filed a Motion for a Speedy Trial. His case was set for October and decisions needed to be made on that motion. The State filed a Motion for a Hearing and a Motion to Continue after receiving the Court's email. Since the Supreme Court had not ordered a hearing, there was no proceeding to continue. The Court told the Clerk to take that pleading out of the file since, if it was discovered by the media, the Court's ruling pursuant to the Supreme Court's decision might be prematurely reported. At the time that the Court ordered the Clerk to remove that pleading from the file, an Assistant District Attorney was present with the Court when the directive was given. Three days later, the State filed this motion to recuse. The formal order granting the new trials was entered a few days later.

² The capital case attorney assigned to these cases.

A motion to recuse should be granted if the judge has any doubt as to his ability to preside impartially in the case. State v. Hines, 919 S.W.2d 573, 578 (Tenn. 1995); see also Tenn. Sup. Ct. R. 10 (Code of Judicial Conduct), Canon 2, R. 2.11(A). However, because perception is also important, recusal is also appropriate “when a person of ordinary prudence in the judge’s position, knowing all the facts known to the judge, would find a reasonable basis for questioning the judge’s impartiality.” Alley v. State, 882 S.W.2d 810, 820 (Tenn. Crim. App. 1995). Hence the test is ultimately an objective one since the appearance of bias is as injurious to the integrity of the judicial system as actual bias. Davis v. Liberty Mut. Ins. Co., 38 S.W.3d 560, 565 (Tenn. 2001); see also Alley, 882 S.W.2d at 822-23. However, in reviewing whether the Court can remain impartial, “[a]ny comments made by the trial court must be construed in the context of all the facts and circumstances to determine whether a reasonable person would construe those remarks as indicating partiality on the merits of the case.” Alley, 882 S.W.2d at 822.

Furthermore, the mere fact that the judge has ruled adversely to a party or witness in a prior judicial proceeding is not ground for recusal. “Rulings of a trial judge, even if erroneous, numerous, and continuous, do not, without more, justify disqualification.” Id. at 821. Subjectively, this Court does not doubt that it can be fair and impartial in the trial of this matter. The Court has no relationship with any person involved in this case.

However, the State asserts that this Court has lost its objectivity on the thirteenth juror rule and has made up its mind not to act as the thirteenth juror under any circumstances since the reactions of the extent of Baumgartner’s misdeeds has sickened, disgusted and nauseated the Court. The Court will agree that Baumgartner’s misdeeds have disgusted this Court. However, this Court denies that it has lost its objectivity in this case.

The State argues that these defendants received a fair trial and the verdict should be validated. The issue is not whether the previous trials were fair. The issue is whether a successor judge can perform the Rule 25 T. R. Crim. P. The State believes that the Court can act as successor judge and desires a Court to do so. This Court has concluded that it cannot perform these duties in large part because of the concept of criminal responsibility. This is an unfavorable ruling to the State, but unfavorable rulings are not grounds for recusal. If that were the case, each unfavorable ruling in any case would trigger a judge shopping process until a favorable ruling was obtained,³ preventing the judicial system from resolving cases in an orderly and timely manner.

The State argues that this Court sent an email suggesting that the Court had heard a rumor that State v. Cobbins would not be ready for trial in August. Somehow, the use of the word rumor appears sinister to the State. The “rumor” that the Court alluded to referred to the pleading filed by Cobbins giving notice of intention to file a writ of certiorari to the United States Supreme Court appealing the Tennessee Supreme Court’s ruling that no structural error existed in these trials. The notice also provided for a stay of the proceeding. State v. Cobbins was set for trial in August 2012. The Court’s secretary in Knoxville also advised the Court that Cobbins’ counsel was not ready for trial. This was crucial information to the Court. In a few days after Cobbins’ filing, the criminal court clerk in Nashville would be summoning 500 people to serve as potential jurors in the August trial. This Court needed confirmation of the status of this case immediately so that these jurors would not be summoned if not needed. The use of “rumor” was to prompt the attorney to give this

³Or, as the Tennessee Supreme Court has stated, “If the rule were otherwise, recusal would be required as a matter of course since trial courts necessarily rule against parties and witnesses in every case, and litigants could manipulate the [impartiality] issue for strategic advantage, which the courts frown upon.” Davis, 38 S.W.3d at 565.

Court an update, not to suggest some *ex parte* communication. The Court also sent an email when a clerk informed the Court that Baumgartner's counsel would be assisting the State in an appeal. However ludicrous that may seem, this case already had the potential for ethical considerations to be an issue, and the Court certainly wanted to preclude another issue intruding into an already difficult case. It has been pointed out that this Court has handled over 140 cases involving the Knox County District Attorney's Office since the granting of a new trial. The Court was not asked to stand down in any of those cases. The Court has not been asked to recuse itself from State v. Coleman, involving one of the co-defendants in these cases. In addition, at the last hearing in this cause which occurred subsequent to the Court's entry of the order granting new trials (i.e., the hearing addressing the State's initial recusal motion), the Court indicated that it would hold that order in naught in Davidson and Cobbins and would review the transcripts one more time to determine if the Court felt it could act as thirteenth juror. The Court has not been able to conduct that review because this motion to recuse precludes the Court from taking any steps until this issue is resolved. Therefore, there is no order either granting or denying a motion for a new trial in Cobbins and Davidson.

The State complains about an email that was inadvertently sent to the defense counsel wherein the Court inquired about availability of dates for scheduling purposes. The Court's office was notified on a Thursday about the failure to copy the State on this email and a copy was sent to the State the following Monday. The email did not deal with substantive issues, only scheduling.⁴

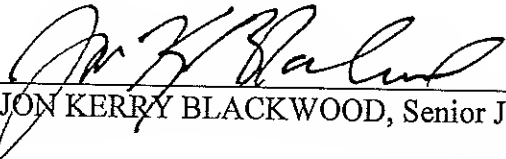
In summary, the Court made unfavorable rulings against the State, but such rulings are not grounds for recusal. The Court concludes that a person of ordinary prudence in the Court's position, knowing all the facts known to the judge would not find a reasonable basis for questioning the

⁴ A copy of the email is made an exhibit to this Order.

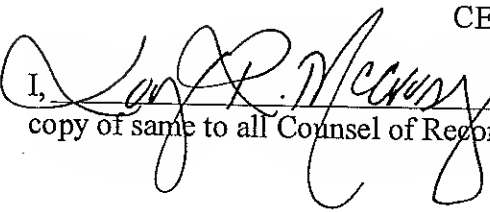
judge's impartiality and denies the State's motion.

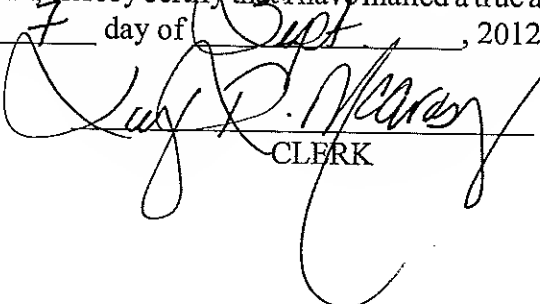
The State shall file any appeal of this order within 15 days pursuant to Tennessee Supreme Court Rule 10A, section 2.

ENTER THIS THE 17th day of September, 2012.


JON KERRY BLACKWOOD, Senior Judge

CERTIFICATE OF SERVICE

I, , Court Clerk, hereby certify that I have mailed a true and exact copy of same to all Counsel of Record this the 7 day of Sept, 2012.


CLERK

From: Karen Smith
To: leland.price@knoxcounty.org; TaKishaFitzgerald
Date: 10/3/2011 10:28 AM
Subject: Knox Criminal Cases No. 86216

Re: Knox Criminal Cases No. 86216

Dear Attorneys:

My experiences as a Senior Judge have taught me the advantages of contingency planning, even when the Court has not determined how it will rule on certain issues.

With that thought in mind, the Court would appreciate a reply regarding your availability in 2012 for the following dates:

March 12-24
June 4-15
July 30-August 10
October 1- October 12.

These dates may never be needed, depending upon the Court's ruling in December. However, the Court believes it would be advantageous to all involved if we started looking at our calendars.

Yours truly,
Jon Kerry Blackwood
Senior Judge

JKB/kss

Exhibit